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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 136

PIERCE FORD SALES, INC., and ELMER W. BEMIS,
Trustee in Bankruptcy,
Petitioners,

—against—

FORD MOTOR COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

PIERCE FORD SALES, INC., and ELMER W. BEMIS, Trustee in Bankruptcy,
Petitioners,
—*against*—
FORD MOTOR COMPANY,
Respondent.

No. 991

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Question Presented

Whether on the particular facts the decision of the Court of Appeals that the verdict returned for petitioners was not supported by evidence, that a verdict should have been directed for respondent, and that respondent's motion for judgment notwithstanding the verdict should have been granted constitutes error calling for review by this Court?

Statement

This action was commenced by petitioner Pierce Ford Sales, Inc. (herein called "Pierce Sales"), its receiver and

certain of its stockholders. Prior to the trial, petitioner Elmer W. Bemis, Trustee in Bankruptcy, was substituted as a party plaintiff in place of the receiver. Following the close of the evidence, the complaint of the stockholder plaintiffs was dismissed on motion of their counsel (6a).

The complaint (9a-14a, 23a-28a) contains two alleged claims for relief. One charges that respondent, contrary to the Automobile Dealer Suits Against Manufacturers Act (70 Stat. 1125; 15 U. S. C. §§ 1221-25), acted in bad faith in performing and complying with the provisions of the "Ford Sales Agreement" under which petitioner acted as an authorized Ford dealer. The other alleges tortious interference with business relations. Both claims for relief are predicated on the same allegations; these allegations charge that respondent, in collusion and conspiracy with New England Stock Control Company (a firm engaged in the business of appraising the inventories of automobile dealers), delayed and ultimately prevented Pierce Sales from selling its business as a going concern with the result that Pierce Sales was rendered insolvent.

The Court of Appeals, accepting petitioners' statement of the evidence whenever support for it appears in the record and viewing the record in the light most favorable to petitioners, found a total failure of proof of any facts which would entitle petitioners to a recovery against respondent (petition, pp. 28, 35). Accordingly the Court of Appeals reversed the judgment for petitioners which had been rendered by the District Court and directed that respondent's motion (7a, 38a) for judgment notwithstanding the verdict be granted (petition, p. 36).

This decision was clearly correct, and the record does not support the presentation of the facts contained in the petition for certiorari.

The inception of Pierce Sales' difficulty, as the petition (p. 11) recognizes, was a general economic recession in the

Brattleboro area which resulted in the closing of several local business concerns and the dissipation of Pierce Sales' capital in payment to the finance company of the balance due in connection with the repossession of cars which had been sold on the instalment basis.

After Pierce Sales in December 1957 requested respondent's assistance in seeking persons who might be interested in purchasing an interest in Pierce Sales' business or in purchasing its assets, Mr. O'Halloran, respondent's dealer placement representative, came to Brattleboro and met with Pierce Sales' president, James Pierce, and a prospective purchaser, Calvin Cole (61a). O'Halloran stated that he thought Cole would be an acceptable Ford dealer (95a), and Pierce and Cole tentatively agreed to a sale of assets of Pierce Sales to Cole at their fair market value to be determined by New England Stock Control Company (61a-62a; Pl. Ex. 11, 377a). The record will not support the contention that Pierce Sales was not aware of the basis on which the valuation would be made. Pierce Sales' attorney and director, Mr. Oakes, testified that he took notes at a preliminary conference with Cole and O'Halloran preparatory to drafting the agreement (91a, 95a-98a, 122a-23a; Def. Ex. E, 401a-02a). These notes include an item as follows (401a):

> "Agreed price is f.m.v. [meaning fair market value, 97a] not actual book value . . ."

The draft agreement prepared by Mr. Oakes' firm provided that the purchase price would be the fair market value as determined by New England Stock Control Company (98a; Pl. Ex. 11, 377a). Petitioners' own witness, Mr. Cole, testified that James Pierce had described to him how the parts inventory would be valued; that it would be broken down into three categories, current parts which would be valued

at 100 per cent of cost, another category which would be valued at 50 per cent of cost, and obsolete parts which would be given no value (159a). The proposed agreement with Mr. Cole, like all other arrangements contemplated by Pierce Sales for the disposition of its business, provided that it was contingent on respondent's acceptance of the purchaser as its dealer in the area (377a).

The transaction was not completed. Before the agreement with Mr. Cole was executed James Pierce entered into comparable negotiations with another prospective purchaser, Premo Ratti (63a-64a). While these negotiations were going on, Cole was told by Mr. Stedman, the proprietor of New England Stock Control Company, to whom he had telephoned, that Stedman (whose firm had counted the inventory but had not completed its computations) believed that the appraisal would show a value between $12,000 and $15,000 (69a, 170a, 185a-87a). Cole told Oakes this and Oakes told Pierce (69a, 101a-04a, 130a, 186a). After receipt of this information, Pierce refused to sign the agreement which had been negotiated with Ratti (104a). Pierce Sales' stockholders, however, continued negotiations looking toward a sale of their stock to Mr. Ratti; the stock was offered to Ratti for less than $19,000, but he refused it (330a; Def. Ex. J, 403a, 407a; Pl. Ex. 13B, 385a).*

The New England Stock Control Company appraisal, which was completed a few days after Cole's phone conversation with Stedman, reported the fair market value of the assets to be $12,983.13 (69a, 238a-41a; Def. Ex. K, 409a). Contrary to the statements contained in the petition,

*The proposal was that the 175 shares held by Mr. and Mrs. Pierce would be sold to Mr. Ratti for $11,600, adjusted by one-half the profit or loss of Pierce Sales for the month of February 1958 (403a) and that the remaining 74 shares held by others would be sold to Ratti for $7,400 (407a). Pierce Sales operated at a loss during February 1958 (385a).

there was, as the Court of Appeals concluded (petition, p. 31), no evidence that Ford had or exercised any influence over New England Stock Control Company. Further statements in the petition (pp. 9, 10, 19 and 21) that the New England Stock Control appraisal represented anything other than an honest exercise of judgment, that the appraisal was made at an arbitrarily reduced figure, or that the appraisal was made on a distress basis or a forced sale basis rather than a going concern basis, are likewise without support in the record. The only evidence in this regard was the testimony of Mr. Stedman, substantially confirmatory of what Pierce himself had told Cole (*supra*, pp. 3-4), that the fair market value of the inventory was arrived at by taking the full replacement value of "fast moving" Ford parts and accessories, one-half the replacement value of "slow moving" parts and accessories, one-fourth the replacement value of outside parts and accessories (those of a type not supplied by Ford) and a value of zero for inactive parts not likely to be sold; Mr. Stedman also testified that the classification of the inventory as fast moving or slow moving or inactive was based on the experience of operating dealers and was made by employees of such dealers who were engaged by New England Stock Control to make the classification; that the valuation of slow moving items at 50 per cent of replacement value and inactive items at zero was based on experience indicating that a dealer would be able to sell only half the total inventory of slow moving items before they became inactive and would not be able to sell inactive items; and that the method followed was the same one normally followed by New England Stock Control in valuing year-end inventories of going concerns (228a-31a, 237a-42a).

Petitioners' contentions with respect to the frustration of the next ensuing negotiations—those with Roy Brown—are equally without support in the record. The initial pro-

posal to Brown was that he would buy fifty shares of newly issued Pierce Sales' stock for $5,000 and would agree to buy from the stockholders at $100 per share over a period of ten years the outstanding 249 shares, and that Brown would be employed as general manager of Pierce Sales and would receive, in addition to a salary, 33⅓ per cent of the net corporate profits after taxes (108a-09a, 114a-15a; Pl. Ex. 15, 380a-87a). Pierce Sales was to raise a further $5,000 of working capital by means of a bank loan to be secured by an outstanding chattel mortgage (386a). In accordance with the provision of the Ford Sales Agreement making respondent's consent necessary for a transfer of any substantial interest in the ownership of the dealer or change in the operating management of the dealer (372a), the proposal was expressly conditioned upon respondent's approval (387a). Respondent disapproved the proposed arrangement for the stated reason that Brown would not have the financial resources to operate the dealership successfully (109a-13a, 299a, 306a; Def. Ex. T, 326a-28a). The proposal was then modified so as to reduce by $5,500 the price which Brown would pay for the outstanding stock (80a-81a, 116a; Pl. Exs. 16A, 16C, 338a-95a), but the price even as so reduced was in excess of the amount at which the stock had been offered to Mr. Ratti and rejected by him (*supra*, p. 4). Brown, after further consultation with respondent's representatives, rejected this arrangement (116a-17a, 220a-26a).

There is no evidence that respondent's disapproval of the arrangement proposed to Brown was not entirely justified. The statements in the petition (pp. 21 and 22) that Brown was then a Ford dealer of high standing and sufficient economic resources and that he had strong financial backing are made without citation to the record and are unsupported by any evidence. The evidence which does

appear in this regard is that Brown was then the manager of a Ford dealership (78a) and that his capital consisted only of $5,000 in borrowed funds, which would be immediately expended in the stock purchase (218a-19a).

Reasons for Denying the Writ

This case presents no significant or substantial question of law. The granting of a motion for judgment notwithstanding the verdict in cases where the verdict is unsupported by evidence does not offend the Seventh Amendment to the Constitution. *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654 (1935). The decision below represented a proper application, in a case where the evidence on behalf of the petitioners was legally insufficient to support judgment in their favor, of the provision of Rule 50 of the Federal Rules of Civil Procedure that, when a motion for directed verdict is denied (6a), the court is deemed to have submitted the action to the jury subject to later determination of the legal questions raised by the motion. *Galloway* v. *United States*, 319 U. S. 372, 389 (1943); *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48, 52-53 (1952).

The decision below is not in conflict with any decision of this Court or of any Court of Appeals. It is in accord with the recent decision in *Woodard* v. *General Motors Corp.*, 298 F. 2d 121 (5th Cir. 1962), *cert. denied*, U. S. (May 21, 1962), affirming summary judgment for the defendant manufacturer in an action brought under the Automobile Dealer Suits Against Manufacturers Act.

ARGUMENT

I

THE COURT OF APPEALS PROPERLY HELD THAT A VERDICT SHOULD HAVE BEEN DIRECTED IN FAVOR OF RESPONDENT UPON THE COMMON LAW CLAIM FOR ALLEGED INTERFERENCE WITH BUSINESS RELATIONS.

The evidence cannot support any inference that Ford wrongfully interfered with the business expectations of Pierce Sales. Contrary to the statement in the petition (pp. 13-14) that the Ford Sales Agreement prohibited transfer of Pierce Sales' assets without respondent's approval, the agreement contained no such provision; and Mr. Oakes, Pierce Sales' own counsel and director, admitted that Pierce Sales was free to sell all or any of its assets to anyone, subject only to the necessity, if Pierce Sales intended to continue operations, of maintaining adequate inventory for that purpose (126a-27a, 132a-34a). Although Pierce Sales could have sold its assets to any willing buyer, it chose to attempt to sell to persons whose principal interest was in succeeding to the Ford dealership. In these circumstances, Pierce Sales did not have any such interest or expectancy as could support an action against respondent by reason of alleged interference with negotiations which, by their terms, were conditioned upon respondent's affirmative approval (Pl. Ex. 11, 377a; Pl. Ex. 12, 380a-81a; 127a; Pl. Ex. 15, 387a; Pl. Ex. 16C, 394a-95a). To impose liability in such circumstances would negate the manufacturer's right to select its dealers and would directly contravene the provision of the Ford Sales Agreement between Pierce Sales and respondent, prohibiting assignment of the dealership without respondent's prior written assent (374a).

There was no evidence that any representative of respondent was actuated by malice or ill will or acted for any purpose other than to assure that the new dealer would be

a person having the capacity and resources to operate a successful business. Moreover, respondent had an absolute right both at law and under the express provision of the Ford Sales Agreement between it and Pierce Sales (Pl. Ex. 7, 372a-74a) to refuse to deal with any purchaser of Pierce Sales' assets or stock. In these circumstances the Court of Appeals correctly held (petition, p. 33) that respondent would have been privileged to interfere in negotiations between Pierce Sales and a prospective purchaser. Since respondent had the undisputed right to approve or disapprove the successor dealer, it could incur no liability to Pierce Sales by reason of alleged interference in its negotiations with prospective assignees—even if, as was not the case here, there had been evidence that respondent's motivation was a malicious one. That principle, binding on the federal courts in this case, was established in *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53 (1896), and was expressly confirmed in *Franzoni v. Newman*, 118 Vt. 421, 424; 110 A. 2d 716, 718 (1955), and in *Mitchell v. Aldrich*, 122 Vt. 49, 163 A. 2d 833, 837, 838 (1960).

II

THE COURT OF APPEALS PROPERLY HELD THAT A VERDICT SHOULD HAVE BEEN DIRECTED IN FAVOR OF RESPONDENT UPON THE STATUTORY CLAIM UNDER THE AUTOMOBILE DEALER ACT.

The Act authorizes the bringing of an action in a District Court by an automobile dealer against a manufacturer engaged in commerce for damages sustained by reason of a failure of the manufacturer (70 Stat. 1125, 15 U. S. C. § 1222):

> "* * * to act in good faith in performing or complying with any of the terms or provisions of the

franchise, or in terminating, canceling, or not renewing the franchise with said dealer * * *."

The Act defines the essential term "good faith" as follows (70 Stat. 1125, 15 U. S. C. § 1221):

> "The term 'good faith' shall mean the duty of each party to any franchise * * * to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party: *Provided*, That recommendation, endorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

As the Court below held (petition, pp. 34-35), both the grammatical structure of the definition of "good faith" and the legislative history establish that the Act is not intended to create a cause of action for conduct which a jury, roaming at large and without reference to any standard, may regard as "unfair" or "inequitable" treatment of dealers. The House Report notes (H. R. Rep. No. 2850, 84th Cong. 2d Sess., p. 9):

> "The term 'fair and equitable' as used in the bill is qualified by the term 'so as to guarantee the one party freedom from coercion, intimidation or threats of coercion or intimidation from the other party.' In each case arising under this bill good faith must be determined in the context of coercion or intimidation or threats of coercion or intimidation."

That a finding of coercion or intimidation is essential to liability under the Act is also recognized in the cases that have been decided under it (*Woodard* v. *General Motors Corp.*, 298 F. 2d 121 (5th Cir. 1962), *cert. denied*, U. S. (May 21, 1962), and other cases cited in the

opinion of the Court of Appeals in the instant case (petition, p. 35)). The Court in the *Woodard* case said (298 F. 2d at 127):

> "* * * By the statutory definition, 'good faith' is restricted to a duty to act in a fair and equitable manner so as to guarantee freedom from coercion, intimidation or threats. The plain meaning construction of the definition would give to a dealer a cause of action only if the acts of the dealer are not fair and equitable and are coercive. * * *"

There was no evidence in the instant case of coercion or intimidation by respondent. The only claim of coercion or intimidation which petitioners assert is that respondent attempted to "control the efforts of its dealer to sell its franchise and assets" (petition, p. 22). But Pierce Sales had no right to sell its franchise without respondent's consent and thereby thrust upon respondent a new dealer whose abilities or financial resources were not satisfactory to respondent. The ample justification for the contractual provision (372a-74a) requiring respondent's consent to a transfer of the franchise was noted by the Court below (petition, pp. 33-36) and was stated in the *Woodard* case as follows (298 F. 2d at 128):

> "* * * The manufacturer is entitled to bargain for the protection of its good name, to provide for the trade acceptance of its wares, and to have a reasonable expectation that those who are marketing its cars have the facilities for coping with the sales efforts of those who are dealing in the products of competitors. * * *"

CONCLUSION

The case depends upon its particular facts. The decision below was correct and there is no conflict. The petition for writ of certiorari should be denied.

Respectfully submitted.

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